



Billing Code: 8025-01

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 107, 120, 121, 124, 125, 126, 127, 142, and 146

RIN: 3245-AG80

Civil Penalties Inflation Adjustments

AGENCY: Small Business Administration.

ACTION: Interim final rule with request for comments.

SUMMARY: The Small Business Administration (SBA) is amending its regulations to adjust for inflation the amount of certain civil monetary penalty that is within the jurisdiction of the agency. This adjustment is required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This rule also makes technical amendments to the regulations governing misrepresentations in SBA contracting programs to add a cross reference to the regulation that contains the applicable penalty amounts for misrepresentations and to correct a citation in the same regulations. Finally, the rule makes a technical amendment to an existing regulation governing small business investment companies to add a cross reference to a new civil penalty provision.

DATES: Effective Date: This rule is effective on August 1, 2016.

Comment Date: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG80 by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail or Hand Delivery/Courier: Arlene Embrey, 409 Third Street, SW, Washington, DC 20416.

SBA will post all comments on <http://www.Regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.Regulations.gov>, please submit the information to Arlene Embrey, Trial Attorney, 409 Third Street, SW, Washington, DC 20416 and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make a final determination of whether the information will be published or not.

FOR FURTHER INFORMATION CONTACT: Arlene Embrey, 202-205-6976, or at Arlene.embrey@sba.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Adjustment Improvements Act), Public Law 114-74, 129 Stat. 584. This act amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat 890 (the 1990 Inflation Adjustment Act), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The 2015 Inflation Adjustment Improvements Act requires agencies to issue an interim final rule (IFR) to: (1) adjust the level of civil

monetary penalties with an initial “catch-up” adjustment; and (2) make subsequent annual adjustments for inflation beginning January 2017.

Based on the definition of a “civil monetary penalty” in the 1990 Inflation Adjustment Act, agencies are to make adjustments to the civil penalties that (i) are for a specific monetary amount as provided by federal law or have a maximum amount provided for by Federal law; (ii) are assessed or enforced by an agency; and (iii) are enforced or assessed in an administrative proceeding or a civil action in the Federal courts. SBA has identified the civil penalties SBA is responsible for assessing or enforcing and in this IFR sets forth the initial adjustments to those penalties that fall within the definition of civil monetary penalties. Penalties that are stated as a percentage of an indeterminate amount or as a function of a violation (penalties that encompass actual damages incurred) are not adjusted by this rule.

The formula for making this initial adjustment under the 2015 Inflation Adjustment Improvement Act requires agencies to use as a base, the Consumer Price Index for the month of October preceding the adjustment, which in this instance is October 2015. SBA has not previously adjusted any of the penalties discussed in this rule. Therefore, based on this formula and the OMB guidance implementing the inflation adjustment requirements, for each penalty being adjusted in this rule, SBA identified the year and corresponding amounts for which the maximum penalty level or range was last established or adjusted. SBA then modified the applicable penalty or penalty ranges by (1) identifying the last date a penalty or penalty range was modified; (2) multiplying the current penalty or penalty range by a multiplier identified for the applicable year in which the penalty or penalty range was last established or modified based on the

Consumer Price Index for October 2015; and (3) ensuring that the product of (1) and (2) did not exceed 150% of the penalty or penalty range that was in effect on November 2, 2015.

II. Civil Money Penalties Adjusted by This Rule

This rule makes adjustments to civil monetary penalties authorized by the Small Business Act, the Small Business Investment Act of 1958 (SBIAct), the Program Fraud Civil Remedies Act and the Byrd Amendment to the Federal Regulation of Lobbying Act. These penalties and the implementing regulations are discussed below.

1. 13 CFR 107.665

SBA licenses, regulates and provides financial assistance to financial entities called small business investment companies (SBICs). Pursuant to section 315 of the Small Business Investment Act of 1958, 15 U.S.C. 687g, SBA may impose a penalty on any SBIC that fails to comply with SBA's regulations or directives governing the filing of regular or special reports. That civil penalty is not more than \$100 for each and every day of the continuance of the SBIC's failure to file such report, unless the SBIC can show that its failure was due to a reasonable cause. SBA has not incorporated this penalty in its regulation. Therefore, a new section is being added to 13 CFR part 107 that will include the adjusted civil penalty.

The adjusted civil penalty amount was calculated by multiplying the current civil penalty by the multiplier of 7.22912 established under the 2015 Inflation Adjustment Improvements Act for civil penalties last amended or established in 1966, to reach a product of \$723 rounded to the nearest dollar. However, because the adjusted amount is

more than the catch up adjustment cap of 150% (or \$250), the new civil penalty amount is \$250 for each and every day the SBIC fails to file the respective report.

2. 13 CFR 120.465

According to the regulations at §120.465, any small business lending company (SBLC) that violates a regulation or written directive issued by the SBA Administrator regarding the filing of any regular or special report is subject to a civil penalty of not more than \$5,000 for each day the company fails to file the report, unless the small business lending company can show that there is reasonable cause for its failure to file. This penalty, authorized by section 23(j) of the Small Business Act, 15 U.S.C. 650(j), was established in 2004.

This rule amends §120.465(b) to adjust the civil penalty from not more than \$5,000 for each day of the continuance of the failure to file the respective report to not more than \$6,229 for each day the small business lending company fails to file the report. The new civil penalty amount was calculated by multiplying the current civil penalty by the multiplier of 1.24588 established under the 2015 Inflation Adjustment Improvements Act for civil penalties last amended or established in 2004, to reach a product of \$6,229, rounding to the nearest dollar. The adjusted amount is not more than the catch up adjustment cap of 150% (or \$7,500) allowed.

3. 13 CFR 142.1(b)

SBA has promulgated regulations at 13 CFR part 142 to implement the civil penalties authorized by the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801-3812. Under the regulation, a person who submits, or causes to be submitted, a false claim or a false statement to SBA is subject to a civil penalty of not

more than \$5,000 for each statement or claim. This penalty is applicable to violations for making misrepresentations to obtain benefits from an SBA financial assistance or contracting program, has not been adjusted previously.

This rule amends §142.1(b) to adjust the current civil penalty amount from \$5,000 to \$10,781 per claim. The adjusted amount was calculated by multiplying the current penalty of \$5,000 by the multiplier established under the 2015 Inflation Adjustment Improvements Act of 2.15628 for civil penalties last established or amended by statute in 1986, to reach a product of \$10,781, rounding to the nearest dollar. The adjusted amount is less than the 150% catch-up adjustment cap (or \$12,500) allowed.

4. 13 CFR 146.400(a), (b), (e)

SBA has promulgated regulations at 13 CFR part 146 to govern lobbying activities by recipients of federal financial assistance. These regulations implement the authority in 31 U.S.C. 1352, which was established in 1989 and imposes penalties on any recipient that fails to comply with certain requirements in the part. Specifically, penalties may be imposed on those who make prohibited expenditures or fail to file the required disclosure forms or to amend such forms, if necessary. The regulations at §146.400(a) and (b) currently impose “a civil penalty of not less than \$10,000 and no more than \$100,000” for each prohibited expenditure or failure to file or amend the disclosure forms. These penalties have not been adjusted previously. Notwithstanding the penalties in paragraphs (a) and (b) described above, the lobbying regulations at §146.400(e) provide that first offenders under those paragraphs are subject to a maximum civil penalty of \$10,000, absent aggravating circumstances.

This rule amends §146.400 (a) and (b), to adjust the current civil penalty amounts from “not less than \$10,000 and not more than \$100,000” to “not less than \$18,936 and not more than \$189,361.” The penalty in paragraph (e) is being amended from \$10,000 to \$18,936. The new civil penalty amounts were calculated by multiplying the current civil penalty of \$10,000 by the multiplier of 1.89361 established under the 2015 Inflation Adjustment Improvements Act for civil penalties last established or amended by statute in 1989 to reach a product of \$18,936, rounding to the nearest dollar. The current maximum civil penalty of \$100,000 was also adjusted using the same method and multiplier to reach a product of \$189,361. Each of these adjusted penalty amounts is less than the allowed 150% catch-up adjustment cap (or \$25,000 and \$250,000, respectively).

III. Technical Amendments

This rule also makes technical amendments to six program-specific regulations that reference the civil monetary penalties for misrepresentation by an applicant for certain SBA program benefits. Each of these regulations, with the heading Civil Penalties, states that program participants or applicants are subject to penalties “under the False Claims Act and under the Program Fraud Civil Remedies Act” but do not reference SBA’s PFCRA implementing regulations. In this rule, SBA amends each of the following regulations to add that reference: (1) §121.108(e)(2) (for misrepresentation of an applicant’s size status as a small business); (2) §121.411(i)(2) (for misrepresentation in SBA’s Section 8(d) Subcontracting Program); (3) §124.1015(e)(2) (for misrepresentation of status as a small disadvantaged business); (4) §125.29(e)(2) (for misrepresentation of status as a small disadvantaged veteran owned small business); (5) §126.900(e)(2) (for misrepresentation of HUBZone status); and (6) §127.700(e)(2) (for

misrepresentation of status as either a Woman Owned Small Business or an Economically Disadvantaged Woman Owned Small Business). This rule also corrects a typographical error in each of the regulations listed in order to correct the statutory citation for PFCRA, which currently reads “331 U.S.C. 3801” instead of “31 U.S.C. 3801”.

Finally, this rule also makes a technical amendment to §107.670(b) to replace the statutory reference to section 315 of the Small Business Investment Act with a reference to §107.665, which is a new section being added by this rule to implement the penalty authorized by section 315 of the SBI Act.

IV. Justification for Interim Final Rule

The 2015 Inflation Adjustment Improvements Act specifically authorizes agencies to promulgate rulemaking for the adjustment to their civil monetary penalties through an interim final rule.

Compliance with Executive Orders 12866, 12988, and 13132, and the Paperwork Reduction Act (44 U.S.S. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601-612).
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this interim final rule does not constitute a significant regulatory action under Executive Order 12866. This is also not a major rule under the Congressional Review Act, 5 U.S.C. 800.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that the rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this interim final rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act

SBA has determined that this rule does not impose additional reporting or recordkeeping requirements.

Regulatory Flexibility Act (RFA)

The RFA requires agencies to consider the effect of their regulatory actions on small entities, including small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule the agency must prepare an analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of such small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required. As stated above, SBA has express statutory authority to issue an interim final rule. Since notice and comment is not required before this rule is issued, SBA is not required to prepare a regulatory analysis.

List of Subjects

13 CFR Part 107

Investment companies, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 120

Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs-business, Loan programs-business, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Hawaiian Natives, Indians-business and finance, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 142

Administrative practice and procedure, Claims, Fraud, Penalties.

13 CFR Part 146

Government contracts, Grant programs, Loan programs, Lobbying, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, SBA amends 13 CFR parts 107, 120, 121, 124, 125, 126, 127, 142, and 146 as follows:

PART 107 – SMALL BUSINESS INVESTMENT COMPANIES

1. The authority citation for part 107 is revised to read as follows:

Authority: 15 U.S.C. 681 et seq., 683, 687(c), 687b, 687d, 687g, 687m.

2. Add §107.665 to subpart F to read as follows:

§107.665 Civil penalties.

Except as provided in §107.670, a Licensee that violates any regulation or written directive issued by SBA, requiring the filing of any regular or special report pursuant to this part, shall be fined a civil penalty of not more than \$250 for each day the Licensee fails to file such report. The civil penalties provided for in this section shall accrue to the United States and may be recovered in a civil action brought by the SBA.

§107.670 [Amended]

3. In §107.670(b), remove the words “provision of section 315(a) of the Act” and add in their place the words “stated in §107.665”.

PART 120 – BUSINESS LOANS

4. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3), and 697(a) and (e); Public Law 111-5, 123 Stat. 115, Public Law 111-240, 124 Stat. 2504.

§120.465 [Amended]

5. Paragraph (b) of §120.465 is amended by removing “\$5,000” and adding in its place “\$6,299”.

PART 121 – SMALL BUSINESS SIZE REGULATIONS

6. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

7. Revise §121.108(e)(2) to read as follows:

§121.108 What are the penalties for misrepresentation of size status?

(e) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812 and any other applicable laws or regulations, including 13 CFR part 142.

8. Revise §121.411(i)(2) to read as follows:

§121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(i) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812 and any other applicable laws or regulations, including 13 CFR part 142.

PART 124 – 8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED
BUSINESS STATUS DETERMINATIONS

9. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99-661, Pub. L. 100-656, sec. 1207, Pub. L. 101-37, Pub. L. 101-574, section 8021, Pub. L. 108-87, and 42 U.S.C. 9815.

10. Revise §124.1015(e)(2) to read as follows:

§124.1015 What are the requirements for representing SDB status, and what are the penalties for misrepresentation?

(e) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws or regulations, including 13 CFR part 142.

PART 125 – GOVERNMENT CONTRACTING PROGRAMS

11. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6), 637, 644, 657f, and 657q.

12. Revise §125.29(e)(2) to read as follows:

§125.29 What are the requirements for representing SDVO SBC status, and what are the penalties for misrepresentation?

(e) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31

U.S.C. 3801-3812, and any other applicable laws or regulations, including 13 CFR part 142.

PART 126 – HUBZONE PROGRAM

13. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644 and 657a.

14. Revise §126.900(e)(2) to read as follows:

§126.900 What are the requirements for representing HUBZone status, and what are the penalties for misrepresentation?

(e) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws or regulations, including 13 CFR part 142.

PART 127 – WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

15. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

16. Revise §127.700(e)(2) to read as follows:

§127.700 What are the requirements for representing EDWOSB or WOSB status, and what are the penalties for misrepresentation?

(e) ***

(2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812, and any other applicable laws or regulations, including 13 CFR part 142.

PART 142 – PROGRAM FRAUD CIVIL REMEDIES ACT REGULATIONS

17. The authority citation for part 142 continues to read as follows:

Authority: 15 U.S.C. 634(b); 31 U.S.C. 3803(g)(2).

§142.1 [Amended]

18. Paragraph (b) of §142.1 is amended by removing “\$5,000” and adding in its place “\$10,781”.

PART 146 – NEW RESTRICTIONS ON LOBBYING

19. The authority citation for part 146 continues to read as follows:

Authority: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 15 U.S.C. 634(b)(6).

§146.400 [Amended]

20. Paragraphs (a), (b), and (e) of §146.400 are amended by removing “\$10,000” wherever it appears and adding in its place “\$18,936” and by removing “\$100,000” and adding in its place “\$189,361”.

Maria Contreras-Sweet,
Administrator.

